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December 11, 2007

Ms. Marlene Dortch, Secretary
Federal Communications Commission
Portals II Building
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Re: Sinclair Broadcast Group, Inc.
MB Docket No. 06-121

Dear Ms. Dortch:

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits this letter in response to the FCC's News Release dated November 13, 2007,[1] which seeks comment regarding Chairman Martin's proposal to revise the newspaper/broadcast cross-ownership rule while making no other changes to the other broadcast ownership rules currently in force, including the television "duopoly" rule.[2] The Chairman's proposal would presume a proposed newspaper/broadcast transaction is in the public interest if it meets a new four part test.[3] Sinclair submits that Chairman Martin's proposal to modify the newspaper/broadcast rule while leaving the television "duopoly" rule in place is unacceptable to say the least, given that it has been more than five years since the United States Court of Appeals for the District of Columbia Circuit invalidated the "duopoly"

1 *See* News Release, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule"(November 13, 2007).

2 Under the 1999 "duopoly" rule, an entity is permitted to own two television stations in the same market provided that at least one of the stations is not ranked among the top four-ranked stations and at least eight independently owned and operating stations would remain in the market after the proposed combination.

3 The four parts to the proposed test are as follows: (1) the market at issue is one of the 20 largest Nielsen Designated Market Areas ("DMAs"); (2) the transaction involves the combination of a major daily newspaper and one television or radio station; (3) if the transaction involves a television station, at least 8 independently owned and operating major media voices (defined to include major newspapers and full-power commercial TV stations) would remain in the DMA following the transaction; and (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA.

rule. The Chairman is compelled to heed the Court's directive yet has inexplicably and unjustifiably failed to do so.

In *Sinclair Broadcast Group, Inc. v. FCC* ("*Sinclair*"), the D.C. Circuit concluded that the FCC's "duopoly" rule was insufficiently deregulatory and remanded the 1999 rule to the FCC, finding it to be arbitrary and capricious, and ordering the FCC to justify it as necessary in the public interest or to repeal or modify it.[4] Despite this decision, the FCC has continued to enforce the rule, even though the FCC itself affirmatively determined in its *2002 Biennial Review* that the rule was not necessary in the public interest to promote viewpoint diversity, program diversity, competition, or localism.[5] If the rule proposed in the November 13 news release is adopted as released, then a rule the D.C. Circuit has already determined to be arbitrary and capricious will continue to apply as the *de facto* permanent rule for years to come.

The purpose of the review underway in this proceeding is to justify, repeal, or modify ownership rules the Court of Appeals has found to be arbitrary and capricious and which the FCC itself has found to be anachronistic. The November 13 proposal does not achieve this objective. In fact, the proposal undermines the objective. It does not eliminate, justify, or modify the eight voices test of the "duopoly" rule that the D.C. Circuit remanded. Instead, it preserves the eight voices test without justification and "modifies" the test only to apply it to a different class of transactions. Under the proposal, the "eight voices test" will continue to apply in the future to each and every scenario to which it applied before. After being sidestepped for five years, the industry and the public are presented with a proposal that does not honor the mandate of the D.C. Circuit even nominally.

The proposed new test, which treats the same media differently depending on who is counting, makes absolutely no sense because, among other things, it is based upon the very same flawed reasoning the D.C. Circuit rejected in *Sinclair*. In *Sinclair*, the Court found that the FCC failed to justify its decision to define "voices" differently for its various ownership rules.[6] Yet that is precisely what the November 13 news release proposes. Under that proposal, the voice-count provision in the television "duopoly" rule includes only the number of television stations in a given market while the voice-count provision in the newspaper/broadcast cross-ownership rule counts *both* newspapers *and*

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4 284 F.3d 148 (D.C. Cir. 2002).

5 *See In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

6 As noted by the Sinclair Court: the Commission included a voice-count provision in both the radio-television cross-ownership rule and the local television ownership rule. However, for the cross-ownership rule, the Commission included as "voices" not only broadcast television and radio stations but also independently owned daily newspapers with circulation exceeding five percent of households in the DMA, and cable systems providing generally available service to television households in the DMA, provided all cable systems, within the DMA are counted as one single voice.

television stations. Consequently, the November 13 proposal actually *compounds* the incongruity that led the *Sinclair* court to remand the rule: it again counts "voices" differently depending on what ownership combination it is considering. If there is a reasoned basis for this distinction it does not appear in the November 13 news release or elsewhere in the record.

While Sinclair wholeheartedly supports any decision to "relax" unnecessary ownership regulations, this feeble effort at "relaxing" the rules is essentially a nullity. For the overwhelming majority of the television industry the relaxation is utterly meaningless. At a time when media companies are spinning off their newspaper and broadcast interests into separate companies for business reasons, the news release proposes to relax the newspaper/broadcast cross-ownership rule slightly, and only in the very largest markets. In an industry with well over 1000 television stations the number of transactions affected by the proposed "relaxation" can likely be counted on fewer than half the fingers on one hand.

In *Fox Television Stations, Inc. v. FCC*, the D.C. Circuit determined that the Commission's obligation under Section 202(h) to determine whether its rules are in the public interest is more akin to Admiral Farragut's command "Damn the torpedoes! Full speed ahead" than to an incremental deregulatory approach.[7] Here, the November 13 proposal's failure to address the television "duopoly" rule is more like a "Full stop" than the required "Full speed ahead." This unjustified approach to perpetuate outdated rules is particularly perplexing in the face of the conclusion in the same November 13 news release that "[C]onsumers have benefited from the explosion of new sources of news and information."

In any case, as Sinclair has demonstrated previously, the FCC's television "duopoly" rule is completely unnecessary to protect diversity, competition, or localism.[8] As the Chairman himself acknowledges, the modern media landscape has changed dramatically over the years. Indeed, in the five years since the *Sinclair* decision, there have been significant chances in the media landscape. In the modern multimedia environment, not only do viewers watch video programming provided over cable, satellite, and fiber optic systems, but they also download video programming to their iPods; watch the latest news, sports, and weather updates on their cell phones; view popular broadcast and cable network programs on their computers; produce, disseminate, and watch amateur video programs through web sites such as YouTube and MySpace; use the Internet to read and watch local and national news; rent and watch DVDs delivered through the mail; and post and read personal, first-hand accounts of major news events through blogs. In short, viewers are able to receive programming through a variety of different media platforms and from a vast number of different sources, yet the

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[7] 280 F.3d 1027 (D.C. Cir. 2002).

[8] Sinclair hereby incorporates by reference its October 23, 2006 comments filed in response to the Commission's Further Notice of Proposed Rulemaking, FCC 06-93, in MB Docket No. 06-121.

November 13 proposal turns a blind eye to the explosion of new media outlets for news, information, and entertainment.

In light of these circumstances and those discussed above, the Commission should eliminate the "duopoly" rule or, at minimum, accept and process applications seeking waivers for joint ownership of television stations, otherwise impermissible under the current "duopoly" rule. As noted, it has been more than five years since the D.C. Circuit concluded that the existing local television ownership restriction is arbitrary and capricious and directed the FCC to repeal or modify that rule. Given the high likelihood that a new rule is unlikely to take effect any time soon, the Commission should, at a minimum, take the incremental step of granting waiver requests of the "duopoly" rule in those situations where an applicant can demonstrate that no harm will result from the proposed combination and that there will be public interest benefits.

Respectfully submitted,

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